

**Award**  
**FINRA Office of Dispute Resolution**

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In the Matter of the Arbitration Between:

Claimant

██████████

Case Number: ██████████

vs.

Respondent

Merrill Lynch, Pierce, Fenner & Smith, Inc.

Hearing Site: Boston, Massachusetts

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Nature of the Dispute: Associated Person vs. Member

**REPRESENTATION OF PARTIES**

For Claimant ██████████: Dochter Kennedy, MBA, J.D., and Harris Freedman, Esq., AdvisorLaw, LLC, Westminster, Colorado.

For Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.: Kathryn D. Perreault, Esq., Bressler, Amery & Ross, P.C., Birmingham, Alabama.

**CASE INFORMATION**

Statement of Claim filed on or about: January 16, 2018.  
Amended Statement of Claim filed on or about: March 23, 2018  
Claimant signed the Submission Agreement: January 16, 2018.

Statement of Answer filed by Respondent on or about: April 9, 2018.  
Respondent signed the Submission Agreement: April 3, 2018.

**CASE SUMMARY**

Claimant asserted the following cause of action: expungement.

Unless specifically admitted in the Statement of Answer, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

**RELIEF REQUESTED**

In the Statement of Claim and Amended Statement of Claim, Claimant requested expungement of customer complaints from her CRD records, compensatory damages of \$1.00, and any and all other relief as deemed just and equitable.

During the hearing, Claimant withdrew her request for compensatory damages.

In the Statement of Answer, Respondent requested that Claimant's request for compensatory damages be denied.

### **OTHER ISSUES CONSIDERED AND DECIDED**

The Arbitrator acknowledges that she has read the pleadings and other materials filed by the parties.

The Arbitrator conducted a recorded telephonic hearing on November 12, 2018 so that the parties could present oral argument and evidence on Claimant's request for expungement.

Respondent participated in the expungement hearing and did not contest the request for expungement.

On September 12, 2018, Claimant notified the customers in the underlying complaints of her request for expungement and of their right to participate in the expungement hearing and also provided the customers with a copy of the Statement of Claim.

The customers in the underlying complaints did not participate in the expungement hearing and did not oppose Claimant's expungement request.

The Arbitrator finds that the customers do not desire to participate in the expungement hearing and that a decision on the merits of Claimant's request can be entered.

The Arbitrator reviewed Claimant's BrokerCheck® Report and the settlement documents for Occurrence Number [REDACTED], considered the amount of payment made to the customer, and considered other relevant terms and conditions of the settlement. The Arbitrator noted that the settlement was not conditioned on the customer not opposing the request for expungement. The Arbitrator also noted that Claimant did not contribute to the settlement amount.

The Arbitrator noted that Claimant did not previously file claims requesting expungement of the same disclosures in the CRD.

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence: Claimant's BrokerCheck Report; Claimant's testimony; the pleadings; Claimant's service of the claim on the customers and affidavit; and, the two customer complaints.

## AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, the Arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. The Arbitrator recommends the expungement of all references to Occurrence Number [REDACTED] from registration records maintained by the Central Registration Depository ("CRD"), for Claimant [REDACTED] (CRD # [REDACTED]), with the understanding that, pursuant to Notice to Members 04-16, Claimant [REDACTED] must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

Unless specifically waived in writing by FINRA, parties seeking judicial confirmation of an arbitration award containing expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents.

Pursuant to Rule 13805 of the Code, the Arbitrator has made the following Rule 2080 affirmative findings of fact:

The claim, allegation, or information is factually impossible or clearly erroneous; and the claim, allegation, or information is false.

The Arbitrator has made the above Rule 2080 findings based on the following reasons:

The allegation against Claimant was that she failed to enter a sales order per the customer's direction. After reviewing all the documents including the complaint and the answer and Claimant's testimony, which I found to be credible, I find this allegation to be clearly erroneous. [REDACTED] stated that she asked the customer if she should enter the sales order and was told not to by the customer. She asked him on November 24, 1998 and the customer did not instruct her to enter the sales order. The customer stated that he would speak with the Office Manager. After the customer had a discussion with the Office Manager, a different representative was assigned to the customer and Claimant had no further interaction with the customer.

Since the customer did not direct Claimant to enter a sell order and because Claimant properly followed all directions provided to her by the customer, the public disclosure of the false allegation does not offer any public protection and has no regulatory value.

2. The Arbitrator recommends the expungement of all references to Occurrence Number [REDACTED] from registration records maintained by the Central Registration Depository ("CRD"), for Claimant [REDACTED] (CRD # [REDACTED]), with the understanding that, pursuant to Notice to Members 04-16, Claimant [REDACTED] must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

Unless specifically waived in writing by FINRA, parties seeking judicial confirmation of an arbitration award containing expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents.

Pursuant to Rule 13805 of the Code, the Arbitrator has made the following Rule 2080 affirmative findings of fact:

The claim, allegation, or information is factually impossible or clearly erroneous; the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; and the claim, allegation, or information is false.

The Arbitrator has made the above Rule 2080 findings based on the following reasons:

The alleged claim at issue was the losses by the customer due to over concentration in two unsuitable investments. Claimant was not the Financial Advisor at the time of the purchases. Based on all the documents presented, including the signed settlement by the customer and Claimant's testimony, I find that this allegation is clearly erroneous. The evidence in the documents and the testimony show that the customer knew what he was doing and that he was in control of his account. There was evidence that the customer had been investing in these options for years. These over concentrations, if they were over concentrations, had occurred prior to the customer being assigned to the Claimant. There was evidence to show that during the time that Claimant serviced the customer's account that she had conversations with the customer. There was testimony by Claimant wherein she discussed with the customer the option of liquidating some positions and investing those proceeds into a managed diversified investment account. The customer rejected the suggestion and refused to sell either position at that time. The customer filed for arbitration and settled the case.

Also, there was evidence that during the time that the customer had invested in the funds that he claimed were over concentrated, Claimant was not the representative. When she became the representative, she suggested that the customer sell those investments and use the proceeds to invest in a managed portfolio and the customer rejected her advice.

The customer had been investing in those funds for a period prior to Claimant taking over the customer's account, and because the customer chose to ignore Claimant's recommendation to sell and to invest in a managed portfolio, it was clearly erroneous to say that Claimant was involved in this over concentration. There is evidence that at the time of the purchase, the concentration of the securities were appropriate for the customer's risk tolerance and that he had been invested in these securities for a period of time before [REDACTED] became the advisor.

3. Any and all claims for relief not specifically addressed herein are denied.

## **FEES**

Pursuant to the Code of Arbitration Procedure, the following fees are assessed:

### **Filing Fees**

FINRA Office of Dispute Resolution assessed a filing fee\* for each claim:

Initial Claim Filing Fee	=\$ 50.00
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*\*The filing fee is made up of a non-refundable and a refundable portion.*

### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, as a party, Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is assessed the following:

Member Surcharge	=\$ 150.00
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### **Hearing Session Fees and Assessments**

The Arbitrator has assessed hearing session fees for each session conducted. A session is any meeting between the parties and the arbitrator, including a pre-hearing conference with the arbitrator, that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) pre-hearing session @ \$50.00/session	=\$ 50.00
Pre-hearing conference: May 8, 2018	1 session

One (1) hearing session on expungement request @ \$50.00/session	=\$ 50.00
Hearing Date: November 12, 2018	1 session

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Total Hearing Session Fees	=\$100.00
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The Arbitrator has assessed the hearing session fees of \$100.00 to Claimant.

All balances are payable to FINRA Office of Dispute Resolution and are due upon receipt.

**ARBITRATOR**

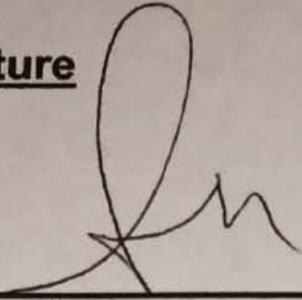
Susan E. Maloney

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Sole Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

**Arbitrator's Signature**



\_\_\_\_\_  
Susan E. Maloney  
Sole Public Arbitrator

12/7/18

\_\_\_\_\_  
Signature Date

December 7, 2018

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Date of Service (For FINRA Office of Dispute Resolution office use only)